



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA-R10-OAR-2012-0557; FRL-9910-30-Region 10]

Approval and Promulgation of Implementation Plans; Swinomish Indian Tribal Community; Tribal Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a Tribal implementation plan (TIP) submitted by the Swinomish Indian Tribal Community (SITC or the Tribe). The TIP was submitted to the EPA on June 28, 2012, and supplementary submittals were received on September 24, 2013, November 18, 2013, and January 28, 2014. The TIP establishes regulations for open burning that will apply to all persons within the exterior boundaries of the Swinomish Reservation (the Reservation). The EPA approved the SITC for treatment in the same manner as a State (TAS) to regulate open burning on the Swinomish Reservation under the Clean Air Act (CAA or the Act) on February 16, 2010. This action proposes to federally approve the TIP. If the EPA finalizes this approval, the provisions of the TIP would become federally enforceable. Upon the effective date of a final action to approve the TIP, the SITC's open burning TIP would replace the Federal Implementation Plan (FIP) provisions regulating open burning within the exterior boundaries of the Swinomish Reservation.

DATES: Comments must be received on or before **Insert date 30 days from date of**

publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R10-OAR-2012-0557, by one of the following methods:

- A. www.regulations.gov. Follow the on-line instructions for submitting comments.
- B. E-mail: vaupel.claudia@epa.gov
- C. Mail: Claudia Vergnani Vaupel, U.S. EPA Region 10, Office of Air, Waste, and Toxics (AWT-107), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101
- D. Hand Delivery: US EPA Region 10 Mailroom, 9th Floor, 1200 Sixth Avenue, Seattle, Washington 98101. Attention: Claudia Vergnani Vaupel, Office of Air Waste, and Toxics (AWT-107). Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R10-OAR-2012-0557. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or email. The www.regulations.gov web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name

and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov index*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101.

FOR FURTHER INFORMATION CONTACT: Claudia Vergnani Vaupel at (206) 553-6121, vaupel.claudia@epa.gov, or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, it is intended to refer to the EPA. Information is organized as follows:

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I. Background for this Proposed Action

The EPA is proposing to approve a TIP submitted by the SITC for approval under section 110 of the CAA. The TIP regulates open burning practices and establishes a Tribal regulatory program applicable to all persons within the exterior boundaries of the Reservation under the CAA to maintain or improve ambient air quality related to open burning. The Swinomish TIP for open burning was formally submitted to the EPA on June 28, 2012, and the EPA received supplementary submittals on September 24, 2013, November 18, 2013, and January 28, 2014.¹

If the EPA finalizes approval of the TIP, the SITC TIP for open burning would replace the currently effective open burning provisions in the FIP for the Swinomish Reservation (found in 40 CFR 49.10960(g)). The EPA promulgated the FIP to protect air quality on 39 Indian reservations in Idaho, Oregon, and Washington, including the Swinomish Reservation. The EPA intended that these rules would be implemented by the EPA, or a delegated Tribal authority, until replaced by TIPs (67 FR 51802, March 18, 2002).

II. CAA Requirements and the Role of Indian Tribes

A. What is the Clean Air Act and its relationship to Indian Tribes?

The Clean Air Act (Act) was originally passed in 1970 and has been the subject of substantial amendments, most recently in 1990. Among other things, the Act requires the EPA to establish

¹ The EPA is taking no action on the provisions identified in the TIP submission, Part I, “The following provisions are not part of the TIP being submitted to EPA for approval”.

National Ambient Air Quality Standards (NAAQS) for certain pollutants; requires the EPA to develop programs to address specific air quality problems; establishes the EPA's enforcement authority; and provides for air quality research. As part of the 1990 amendments, Congress added section 301(d) to the Act authorizing the EPA to treat eligible Indian Tribes in the same manner as States (TAS) and directing the EPA to promulgate regulations specifying those provisions of the Act for which TAS is appropriate. In February of 1998, the EPA implemented this requirement by promulgating the Tribal Authority Rule (TAR) (63 FR 7254, February 12, 1998, codified at 40 CFR part 49). The EPA included relevant provisions relating to implementation plans among the provisions for which TAS is appropriate (exceptions are identified in 40 CFR 49.4).

Under the provisions of the Act and the EPA's regulations, Indian Tribes must demonstrate that they meet the eligibility criteria in section 301(d) of the Act and the TAR in order to be treated in the same manner as States. The eligibility criteria are: (1) the Indian Tribe is federally-recognized; (2) the Indian Tribe has a governing body carrying out substantial governmental duties and powers; (3) the functions the Indian Tribe is applying to carry out pertain to the management and protection of air resources within the exterior boundaries of the reservation (or other areas within the Indian Tribe's jurisdiction); and, (4) the Indian Tribe is reasonably expected to be capable of performing the functions the Indian Tribe is applying to carry out in a manner consistent with the terms and purposes of the Act and all applicable regulations.

B. What is an implementation plan?

An implementation plan is a set of programs and regulations developed by the appropriate regulatory agency to assure healthy air quality through the attainment and maintenance of the NAAQS. These plans can be developed by States, eligible Indian Tribes, or the EPA, depending

on the entity with jurisdiction and the EPA's approval in a particular area. For States, such plans, once approved by the EPA, are referred to as State implementation plans or SIPs. Similarly, for eligible Indian Tribes these plans, once approved, are called Tribal implementation plans or TIPs. Occasionally, the EPA will develop an implementation plan for a specific area or source. This is referred to as a Federal implementation plan or a FIP. Once final approval becomes effective as published in the *Federal Register*, the provisions of an implementation plan become federally enforceable. An applicable implementation plan may be comprised of both TIPs and FIPs and/or SIPs and FIPs.

The contents of a typical implementation plan may fall into three categories: (1) Agency-adopted control measures, which consist of rules, regulations or source-specific requirements (e.g., orders, consent decrees or permits); (2) agency-submitted "non-regulatory" components (e.g., attainment plans, rate of progress plans, emission inventories, transportation control measures, statutes demonstrating legal authority, monitoring programs); and (3) additional requirements promulgated by the EPA (in the absence of a commensurate agency provision) to satisfy a mandatory Clean Air Act section 110 or part D requirement. The implementation plan is a living document which can be revised by the State or eligible Indian Tribe as necessary to address air pollution problems. Accordingly, the EPA from time to time must take action on implementation plan revisions which may contain new and/or revised regulations that will become part of the implementation plan.

Upon submittal to the EPA, the Agency reviews implementation plans for conformance with Federal policies and regulations. If the implementation plan conforms, the State's or eligible Indian Tribe's regulations become federally enforceable upon the EPA's approval. The codification is usually accomplished by first announcing the EPA's findings in the Federal

Register through a proposed rulemaking action, with an appropriate public comment period.

After evaluating comments received on the proposal, a final rulemaking action will be published by the EPA, which will incorporate the implementation plan, if approved, into the *Code of Federal Regulations* (CFR).

C. How do Tribal implementation plans compare to State implementation plans?

The Act requires each State to develop, adopt, and submit an implementation plan for the EPA's approval into the SIP. Several sections of title I of the Act provide structured schedules and mandatory requirements for SIP preparation and contents. These are further developed in 40 CFR part 51. The SIP program reflects each State's particular needs and air quality issues. At a minimum, SIPs must meet minimum Federal standards. If a State fails to submit an approvable SIP within the schedules provided in the Act, sanctions can be imposed on the State, and if the State still does not submit an approvable implementation plan, the EPA is required to develop and enforce a FIP to implement the applicable Act requirements for that State.

Sections 110 and 301(d) of the Act and the EPA's implementing regulation at 40 CFR part 49 provide for Tribal implementation of various Act programs including TIPs. Eligible Indian Tribes can choose to implement certain Act programs by developing and adopting a TIP and submitting the TIP to the EPA for approval. TIPs: (1) are optional; (2) may be modular; (3) have flexible submission schedules; and (4) may allow for joint Tribal and EPA management as appropriate.

1. Optional

The Act requires each State to develop, adopt and submit a proposed SIP for the EPA's approval. Unlike States, Indian Tribes are not required to adopt an implementation plan. In the TAR, the EPA recognized that not all Indian Tribes will have the need or the desire for an air

pollution control program, and the EPA specifically determined that it was not appropriate to treat Indian Tribes in the same manner as States for purposes of mandatory plan submittal and implementation deadlines. *See* 40 CFR 49.4.

2. Modular

The TAR offers eligible Indian Tribes the flexibility to include in a TIP only those implementation plan elements that address their specific air quality needs and that they have the capacity to manage. Under this modular approach, the TIP elements the eligible Indian Tribe adopts must be “reasonably severable” from the package of elements that can be included in a whole TIP. As provided in the TAR, “reasonably severable” means that the parts or elements selected for the TIP are not necessarily connected to or interdependent on parts not included in the TIP, and are consistent with applicable Act and regulatory requirements. TIPs are fundamentally different than SIPs because, while the Act requires States to prepare an implementation plan that meets all of the requirements of section 110 of the Act, an Indian Tribe may adopt TIP provisions that address only some elements of section 110.

3. Have Flexible Submission Schedules

Neither the Act nor the TAR requires Indian Tribes to develop TIPs. Therefore, unlike States, Indian Tribes are not required to meet the implementation plan submission deadlines or attainment dates specified in the Act. Indian Tribes can establish their own schedules and priorities for developing TIP elements (e.g., regulations to limit emissions of a specific air pollutant) and submitting the TIP to the EPA for approval. Indian Tribes will not face sanctions for failing to submit or for submitting incomplete or deficient implementation plans. *See* 40 CFR 49.4.

4. Allow for Joint Tribal and EPA Management

Consistent with the Act and the TAR, eligible Indian Tribes can revise a TIP to include appropriate new programs or return programs to the EPA for Federal implementation as necessary or appropriate based on changes in Tribal need or capacity. The EPA may regulate emission sources that the Indian Tribe chooses not to include in a TIP if the EPA determines such regulation is necessary or appropriate to adequately protect air quality. This type of joint management is expected to result in a program fully protective of Tribal air resources.

III. Tribal Implementation Plan Requirements

For an Indian Tribe to receive the EPA's approval of a TIP, the Indian Tribe must, among other things: (1) obtain a determination from the EPA that the Indian Tribe is eligible for TAS for purposes of the TIP; and (2) submit to the EPA a TIP that satisfies the requirements of the Act and relevant regulations that apply to the plan elements and functions for which the Indian Tribe seeks approval.

1. Determination of eligibility for TAS for purposes of the TIP.

To be found eligible for TAS for the purpose of carrying out an implementation plan under the Act, an Indian Tribe must meet the requirements of section 301(d) of the Act and 40 CFR 49.6:

- The Indian Tribe must be federally recognized;
 - The Indian Tribe must have a governing body carrying out substantial governmental duties and powers over a defined area;
 - The functions to be exercised by the Indian Tribe must pertain to the management and protection of air resources within the exterior boundaries of the Indian Tribe's reservation or other areas within the Indian Tribe's jurisdiction;
 - The Indian Tribe must be reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and all applicable regulations.
- 2. Submission of an approvable TIP.**

Implementation plans are governed by section 110 of the CAA. Under sections 110(o) and

301(d) of the CAA and the TAR (40 CFR 49.9(h)), any TIP submitted to the EPA shall generally be reviewed in accordance with the provisions for review of State implementation plans set forth in CAA section 110. Thus, the TIP must include not only the substantive rules by which the Indian Tribe proposes to help achieve the air quality goals of the CAA, but also provide assurances that the Indian Tribe will have adequate personnel, funding, and authority to administer the plan, as required by CAA section 110(a)(2)(E), and requirements governing conflicts of interest as required by CAA section 128.²

Under CAA section 128, implementation plans must contain requirements that (1) any “board or body” that approves permits or enforcement orders have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to the permits or orders, and (2) conflicts of interest are disclosed. The EPA does not intend to read CAA section 128 to limit an Indian Tribe’s flexibility in creating a regulatory infrastructure that ensures an adequate separation between the regulator and the regulated entity (59 FR 43964, August 25, 1994).

The following technical elements may be included in a TIP:

- A list of regulated pollutants affected by the plan;
- Locations of affected sources and the air quality designation (i.e., attainment, unclassifiable, nonattainment) of the source location;
- Projected estimates of changes in current actual emissions from affected sources;
- Modeling information (i.e., input and output data, justification of models used, data and assumptions used);
- Documentation that the plan contains emission limitations, work practice standards, and recordkeeping/reporting requirements;
- Regulations.

² See section 110(a)(2)(E) of the Act, which requires all implementation plans to contain the requirements described in section 128 of the Act. Tribal implementation plans must comply with section 128 as neither section 110(a)(2)(E) nor section 128 of the Act are listed in the TAR as provisions that are inapplicable to Indian Tribes seeking TIP approval under the Act. See 40 CFR 49.4. The EPA explicitly contemplated the applicability of CAA section 128 in the preamble to the proposed TAR. See 59 FR 43964, August 25, 1994.

The TAR allows Indian Tribes to develop, adopt, and submit an implementation plan for approval as a TIP in a modular fashion, so it may not be necessary that a plan meet all of the requirements identified above to be approvable.

IV. Evaluation of the SITC TIP

A. What air quality goals does the SITC TIP address?

The SITC TIP for open burning provides a regulatory structure to protect air quality from the impacts of open burning within the boundaries of the Swinomish Reservation. The SITC TIP is comprised of two parts. Part I is the “Swinomish Tribal Implementation Plan for Open Burning”, describing the Tribe’s open burning program, including requirements on conflicts of interest (per CAA section 128), public notification and public hearings (per 40 CFR 51.285 and 51.102) and demonstrating available resources (per 40 CFR 51.280). Part II of the TIP is the “Clean Air Act,” chapter 2 of title 19 of the Swinomish Tribal Code (STC). Part II includes regulations governing open burning practices within the boundaries of the Swinomish Reservation.

In general, the TIP establishes:

1. a tribally-operated permitting program to authorize open burning under specified parameters;
2. standards for open burning;
3. a list of prohibited materials that may not be burned;
4. the circumstances under which the Tribe may call a burn ban during periods of impaired air quality or high fire danger;
5. a permitting fee system; and
6. a system of enforcement, including authority to perform inspections and issue enforcement orders, and a process for appeals.

B. Has the SITC obtained a determination from the EPA that it is eligible for TAS for purposes of the TIP?

On February 16, 2010, the EPA determined that the SITC had demonstrated that it was

eligible for TAS for the purpose of implementing a TIP to regulate open burning on the Swinomish Reservation under section 110 of the CAA. The SITC's eligibility application submitted January 6, 2009, addressed the requirements of section 301(d) of the Act and 40 CFR 49.6. The EPA found that the SITC satisfied those requirements and notified the SITC of its TAS eligibility determination to implement an open burning TIP. *See* letter dated February 16, 2010, from Michelle Pirzadeh, Acting Regional Administrator, EPA Region 10, to the Honorable M. Brian Cladoosby, Tribal Chairperson, Swinomish Indian Tribal Community, included in the docket for this action.

C. Has the SITC submitted to the EPA a TIP that is approvable as satisfying the requirements of the Act and relevant regulations?

In accordance with CAA section 110(a), the SITC submittal includes documentation that the Tribe issued a public notice soliciting comments on its proposed TIP on December 21, 2012, and held a public hearing on January 26, 2012, with no public comments received. The Swinomish Indian Senate adopted the TIP for open burning on March 6, 2012, and the ordinance that amended chapter 2 of title 19 of the STC was approved by the Superintendent of the Puget Sound Agency of the Bureau of Indian Affairs on March 9, 2012 – the effective date of chapter 2 of title 19 of the STC. The SITC formally submitted the TIP to the EPA on June 28, 2012, and the EPA received supplementary submittals on September 24, 2013, November 18, 2013, and January 28, 2014.³

D. How would the SITC administer the TIP?

As noted above, CAA section 110(a)(2)(E) requires an implementation plan to provide

³ The SITC made four TIP submissions which included more than one version of certain components of the TIP. The EPA is taking action on the most recent versions of these components as detailed in the docket for this action.

assurances that the Indian Tribe will have adequate personnel, funding, and authority to administer the plan. Under CAA section 128, implementation plans must contain requirements governing conflicts of interest.

The SITC TIP will be administered and enforced by the air program staff within the Swinomish Office of Planning and Community Development (the Planning Department or the Department). Under the SITC TIP, the air program staff is responsible for issuing open burning permits, declaring burn bans, conducting inspections, issuing enforcement orders, and publishing public notices and conducting hearings.

The SITC TIP describes the resources necessary to implement the TIP for open burning. These include staff time, supplies for equipment maintenance, travel, training, and indirect costs. The TIP describes anticipating funding from the EPA as part of the SITC's section 105 air program grant and seeking funding from other sources as needed, including, but not limited to, additional support through the Tribal budget process. The TIP also establishes permit fees.

In accordance with CAA section 128, the SITC TIP requires any board or individual exercising approval authority over permits or enforcement orders issued pursuant to the TIP to:

- (1) have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders (provided, however, that elected officials or employees of the Tribe who receive income from the Tribe for the performance of their official duties may exercise approval authority over permits or enforcement orders issued to the Tribe); and (2) shall adequately disclose any potential conflicts of interest. Any such disclosures will be in writing to the Planning Commission (a Swinomish Tribal Senate committee that provides policy and guidance) and will become a part of the record of the permit or enforcement order.

E. What requirements does the SITC TIP contain?

The SITC TIP open burning regulations apply to open burns conducted within the Reservation, except for burns conducted for tribally-recognized cultural or spiritual purposes. An open burn permit is required for any person who commences an open burn that is four or more feet in diameter or three or more feet in height. The regulations prohibit the burning of certain materials, including, but not limited to, structures, garbage, dead animals, junked motor vehicles, tires or rubber materials, plastics, tar, petroleum products, paints, paper products other than what is necessary to start a fire, lumber or timbers treated with preservatives, construction debris or demolition waste, pesticides, herbicides, fertilizers, or other chemicals, insulated wire, batteries, light bulbs, materials containing mercury, asbestos or asbestos-containing materials, pathogenic waste, hazardous waste, any material other than natural vegetation that normally emits dense smoke or noxious fumes when burned, any material from a site other than the parcel number upon which the open burn is conducted, or fireworks or associated packaging other than those permitted under STC title 15, chapter 2.

The TIP also authorizes the Planning Department to call burn bans in the case of impaired air quality or the high risk of fire. The Department shall declare a burn ban based on impaired air quality when pollutant concentrations are measured or predicted within the Reservation to: (1) exceed 75% of the currently effective NAAQS for PM_{2.5} or PM₁₀; or (2) exceed any other of the currently effective NAAQS.

Notice of burn bans will be issued with signs near access roads, and on the open burning hotline. Burn bans apply to all open burning on the Reservation with the exception of burns for cooking, recreational or heating purposes, or an open burn conducted for tribally-recognized cultural or spiritual purposes. If a burn begins prior to the ban being issued and its cessation

would cause greater emissions than allowing it to continue, the Planning Department may authorize the open burn to continue. The Department may also use its discretion to ban all open burning on the Reservation based on the severity of air quality conditions or risk of fire danger. This includes fires for cooking, recreational or heating purposes, with the exception of fires in homes that use woodstoves as a primary source of heat.

The TIP establishes requirements and procedures for obtaining an open burn permit on land within the exterior boundaries of the Swinomish Reservation. A complete permit application must be submitted and a permit obtained at least three working days prior to the date of the open burn. The Planning Department may issue an open burn permit if after review it is determined that the open burn will not cause adverse air quality or endanger the public. Issued permits will contain standard permit conditions and may contain additional permit conditions. These permit conditions establish parameters for open burning designed to protect air quality. There are also special permitting provisions for training fires and agricultural burning. The TIP establishes a fee system for open burning and special use permits.

The TIP includes provisions to be followed by the Tribe in enforcing the open burning TIP. The Planning Department is authorized to conduct inspections to ensure compliance with the open burning conditions. If violations are found, a permit may be revoked and/or an enforcement order may be issued requiring the responsible party to cease and abate the violating activity, and/or pay a civil penalty and/or damages. Notices of violations will cite specific details of the violation, including applicable permit conditions. The director of the Planning Department must disclose any conflicts of interest with regard to persons issued a permit or subject to an enforcement order.

The TIP also identifies a system for appeals. Any person whose permit application is denied

or to whom the Department issues an enforcement order may appeal the decision to the Planning Commission, Swinomish Tribal Senate, and Swinomish Tribal Court in accordance with the appeals process described in STC 19-04.560 through 19-04.600.

The EPA is proposing to approve the provisions of title 19, chapter 2 of the STC into the Swinomish TIP as part of today's proposed action (with the exception of the operating permits, nuisance, and carbon emission fee provisions that were not included in the Tribe's submittal). We note that approval of any Tribal enforcement-related authorities (e.g., enforcement, penalties, damages, hearings, appeals) into the TIP would have no effect on the EPA's independent authorities under sections 113 and 114 of the Act. Any enforcement of the TIP's requirements brought by the EPA would proceed under the EPA's independent authorities under the Clean Air Act provisions noted above.

If the EPA issues a final approval of the TIP, the SITC TIP for open burning would replace the currently effective open burning provisions in the FIP for the Swinomish Reservation (found at 40 CFR 49.10960(g)). All other provisions of the FIP for the Swinomish Reservation will be unaffected by this action.

The EPA has the authority, under the Act, to enforce the requirements in an approved TIP. The EPA will work cooperatively with the Indian Tribe in exercising its enforcement authority. The EPA recognizes that, in certain circumstances, eligible Indian Tribes have limited criminal enforcement authority. The TAR specifically provides that such limitations on an Indian Tribe's criminal enforcement authority do not prevent a TIP from being approved. Where implementation of the TIP requires criminal enforcement authority, and to the extent an Indian Tribe is precluded from asserting such authority, the Federal government has primary criminal enforcement responsibility. A memorandum of agreement between an Indian Tribe and the EPA

is an appropriate way to address circumstances in which the Indian Tribe is incapable of exercising applicable enforcement requirements as described in 40 CFR 49.7(a)(6) and 40 CFR 49.8. In 2010, the Tribe and the EPA entered into a memorandum of agreement that addresses the process by which the Tribe will provide potential investigative leads to the EPA and/or other appropriate Federal entities in an appropriate and timely manner.

V. Proposed Action

Under CAA sections 110(o), 110(k)(3) and 301(d), the EPA is proposing to approve the TIP that was submitted by the SITC on June 28, 2012, and the supplementary submittals received on September 24, 2013, November 18, 2013, and January 28, 2014, for regulating open burning within the exterior boundaries of the Swinomish Reservation. The SITC TIP includes regulations governing prohibited materials, burn bans, open burning permit requirements and fees, and provisions related to enforcement of the TIP. Although the EPA is proposing to approve the regulations discussed above, the EPA is not proposing to incorporate by reference into the CFR the enforcement-related authorities for the reasons discussed in section IV. If the EPA takes final action to approve this TIP, the SITC TIP for open burning will apply to all persons within the exterior boundaries of the Reservation and will replace the existing open burning provisions in the FIP for the Swinomish Reservation (49.10956(g) and 49.10960(g)).

VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve laws of

an eligible Indian Tribe as meeting Federal requirements and imposes no additional requirements beyond those imposed by Tribal law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Because this rule proposes to approve pre-existing requirements under Tribal law and does not impose any additional enforceable duty beyond that required by Tribal law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires the EPA to develop an accountable process to ensure “meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.” The EPA has concluded that this proposed rule will have Tribal implications in that it will have substantial direct effects on the SITC. However, it will neither impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law. The EPA is proposing to approve the SITC’s TIP at the request of the Tribe. Tribal law will not be preempted as the SITC incorporated the TIP into Tribal law on March 9, 2012. The Tribe has applied for, and fully supports, the proposed approval of the TIP. If it is finally approved, the TIP will become federally enforceable.

The EPA worked with Tribal air program staff early in the process of developing the TIP to allow for meaningful and timely input into its development. To administer an approved TIP, Indian Tribes must be determined eligible (40 CFR part 49) for TAS for the purpose of administering a TIP. During the TAS eligibility process, the Tribe and the EPA worked together to ensure that the appropriate information was submitted to the EPA. The SITC and the EPA also

worked together throughout the process of development and Tribal adoption of the TIP.

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a TIP covering areas within the exterior boundaries of the SITC Reservation, and does not alter the relationship or the distribution of power and responsibilities between States and the Federal government established in the Clean Air Act. This proposed rule does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, February 16, 1994). This proposed rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (15 U.S.C. 272) do not apply to this proposed rule. In reviewing TIP submissions, the EPA’s role is to approve an eligible Indian Tribe’s submission, provided that it meets the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the Indian Tribe to use voluntary consensus standards (VCS), the EPA has no authority to disapprove a TIP submission for failure to use VCS. It would thus be inconsistent with applicable law for the EPA, when it reviews a TIP submission, to use VCS in place of a TIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of

section 12(d) of the NTTAA do not apply.

This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

List of Subjects in 40 CFR Part 49

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 21, 2014.

Dennis J. McLerran,
Regional Administrator,
Region 10.